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No. 77-1585

In the Supreme Court of the United States

OCTOBER TERM, 1978

WALTER LEE STEPHENSON AND KATIE C. STEPHENSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the court of appeals affirming petitioners' convictions (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1978. A petition for rehearing was denied on March 22, 1978 (Pet. App. B). The petition for a writ of certiorari was filed on May 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a search warrant was issued on stale information.

2. Whether the court's instructions on knowing possession of a firearm were adequate.

3. Whether petitioner Walter Stephenson received timely notice that he was subject, in the event of conviction, to an enhanced sentence as a dangerous special offender under 18 U.S.C. 3575.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioners, husband and wife, were convicted of possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. App. 1202(a)(1). Petitioner Walter Stephenson was adjudged a special dangerous offender pursuant to 18 U.S.C. 3575 and sentenced to seven years' imprisonment. Petitioner Katie Stephenson was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence showed that on February 11, 1977, petitioners had a .38 caliber revolver in a dresser drawer in the bedroom of their residence in Louisville, Kentucky, and that they both had previously been convicted of a felony.

The circumstances under which this firearm was seized were presented at a suppression hearing. On February 9, 1977, a reliable informant told Louisville police detective Greer that he had just seen a large amount of heroin in the possession of petitioner Walter Stephenson at the latter's residence (S. Tr. 13-14).[1] Greer and another detective immediately went to the scene and observed a

[1]"S.Tr.," "Sent.Tr." and "I.Tr." refer respectively to the transcript of the Hearing on Motion to Suppress, the transcript of the Hearing and Sentencing as a Special Dangerous Offender, and the transcript of the court's instructions.

large number of persons, several of whom officer Greer knew to be drug users, enter the residence and leave several minutes later (S. Tr. 18-19). Later that day Greer typed an affidavit for a search warrant setting forth that information but mistakenly typed the date that he had received his information and observed petitioners' home as *January* 9, 1977 instead of the correct date (S. Tr. 9, 13-14, 17-18). The next day, February 10, 1977, he applied for and was issued a search warrant which he executed on February 11 (S. Tr. 13, 22). In the search, officer Greer seized a small amount of heroin, measuring devices for heroin, marijuana, and the firearm which was the subject of the prosecution (Sent. Tr. 27-28).

ARGUMENT

1. Petitioners contend (Pet. 7-13) that the evidence seized from their residence should have been suppressed because the warrant authorizing the search was issued on the basis of an affidavit containing information thirty-two days old. This claim is without merit.

As noted, the search warrant was issued on February 10, 1977; the supporting affidavit stated that the information resulting in probable cause came to light on January 9, 1977. But officer Greer testified under oath that he had mistakenly typed "January" instead of "February" (S.Tr. 9, 14, 18). The judge who administered the oath and issued the warrant testified that officer Greer had told him "[m]y informant last night told me" of the drugs in petitioners' home (Sent. Tr. 10-12). Thus the warrant did not issue on stale information, and the suppression motion was properly denied.

2. Petitioners argue (Pet. 13-14) that the court's instructions did not "adequately provide[] the jury with the guidance that both defendants must have knowledge of

the presence of the firearm in order to be found guilty." The short answer to this contention is the instruction itself (I.Tr. 8; emphasis added):

> The law recognizes two kinds of possession; actual possession and constructive possession. A person who *knowingly* has direct control over a thing at a given time is then in actual possession of it, just like I'm in actual possession of this pen because I have it in my possession and I fully control it. A person, although not in actual possession, who *knowingly* has both the power and the intention at a given time to exercise dominion or control over a thing either directly or indirectly or through another person or persons is then in constructive possession of it.

The court then instructed that, in order to convict, the jury must find that each defendant had "actual or constructive ~~possession~~ possession" (I.Tr. 9). The instructions thus adequately apprised the jury that the possession had to be knowing.

3. Petitioner Walter Stephenson contends (Pet. 15-17) that the dangerous special offender notice was not filed a "reasonable time before trial" as required by 18 U.S.C. 3575. This claim is without foundation.

The notice was filed on June 1, 1977, 23 days after arraignment and prior to petitioners' suppression hearing. Following the suppression hearing that day, the district court was scheduled to conduct the trial of another case. When the defendant in that case absconded, the court decided to proceed to trial in this case and did so during the afternoon of June 1, 1977. Petitioner did not object to the court's decision to start the trial at that time. Petitioner thus has no basis to complain now that trial followed too quickly upon the filing of the notice.

In any event, petitioner had ample time to prepare for the post-conviction hearing to determine if he was in fact a dangerous special offender. Under 18 U.S.C. 3575(b), a defendant is entitled to at least ten days' notice before such a hearing may be conducted. The hearing was held on June 24, and thus petitioner had more than three weeks to prepare for it. Petitioner's counsel stated that he was "prepared for the hearing" (Sent. Tr. 7). The notice therefore complied with the statutory requirement and afforded petitioner adequate time to prepare his defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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